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Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 292

ACME SPECIALTIES CORP., an Illinois Corp.,
Petitioner,

vs.

JOSEPH BIBB, Director of the Department of Public Safety, and

LATHAM CASTLE, Attorney General, State of Illinois,
Respondents.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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CERTIFICATE OF SERVICE APPENDED.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

REPLY TO SUNDRY CONTENTIONS AND SUGGESTIONS.

Respondents have predicated their entire argument in opposition to the Petition for a Writ of Certiorari to the Supreme Court of Illinois on the supposition that this Court will take judicial notice that many injuries and deaths are the consequences of the use of sparklers by children. It is respectfully urged that the supposition is false.

To say that a Court will take judicial notice of a fact is merely another way of saying that the usual forms of evidence will be dispensed with if the fact is one of public concern and notoriety which is known generally by all well-informed persons. (*Shapleigh* v. *Mier*, 299 U. S. 468; 16 Am. Jur., Evidence, Sec. 16.)

No proof was offered in this case as to the number of injuries or deaths caused by sparklers. Indeed, no proof either that they are safe or are dangerous was permitted as the complaint was stricken and the case dismissed on respondents' motion. If evidence had been permitted, it would have appeared that the number of injuries and the number of deaths throughout the entire United States attributable to sparklers are so negligible, that no records are kept by any responsible agency in the United States to categorize accidents caused by sparklers. Indeed, the National Safety Council stopped keeping records of such accidents in 1946 because the number of accidents laid directly to sparklers had reached the irreducible minimum.

Despite respondents' unsupported assertions to the contrary, a sparkler is not inherently dangerous. In the few instances where cases have arisen regarding the nature of sparklers, it has been uniformly held that a sparkler is not inherently dangerous. (*Beznor* v. *Howell*, 233 N. W. 758, 203 Wis. 1; *Henry* v. *Crook*, 202 App. Div. 19, 195 N. Y. S. 642; *Schmidt* v. *Capital Candy Co.*, 166 N.W. 502, 139 Minn. 378). In the *Schmidt* case the action was against a manufacturer of sparklers for burns caused a seven year old girl by a sparkler coming in contact with her dress and setting it on fire. It was contended by plaintiff that a sparkler is inherently dangerous. In regard to this contention the court said at page 381:

"* * * We do not think the article sold in the instant case so inherently dangerous as to render the seller liable without proof or knowledge on his part of some concealed danger, not apparent from mere inspection. There is no such proof in this case. So far as we are advised by the record, the danger of setting off the sparkler is no greater than that which is found in the ordinary match, carelessly lighted."

In *Henry* v. *Crook*, 202 App. Div. 19, 195 N. Y. S. 642, the court said at page 643:

"It is not necessary for us in this case to hold, and we do not hold that the sparkler itself was inherently or imminently dangerous. They are no more dangerous in themselves than the small firecracker or the ordinary match."

In *Beznor* v. *Howell*, 233 N.W. 758, 203 Wis. 1, the court exonerated a manufacturer of sparklers from liability for injuries resulting from the use of sparklers. The court said at page 760:

"In harmony with the holding of the trial judge and also in harmony with the language found in the two cases just considered (*Henry* v. *Crook* and *Schmidt* v. *Capital Candy Co.*) we have no hesitation in deciding that an ordinary sparkler (in the absence of negligent preparation for market, defective construction or hidden or concealed defects) is clearly not an inherently dangerous instrument, and is in fact no more dangerous (if as dangerous) than the small firecracker or a common match. The only possible danger from a burning sparkler which is not defective is in permitting it while burning, to touch the clothing or other combustible material or some part of the human body; that a sparkler can be lighted only by a match, candle, fire or burning sparkler is very clear; that a sparkler, while burning and at the point of burning or emitting sparklers, is very hot, in fact red hot, is perfectly obvious to any one."

No matter what article is manufactured today and no matter how safe in and of itself it may be, if used negligently or carelessly, it will cause injuries and economic waste.

It is petitioner's contention that there is nothing inherently harmful or dangerous to the public welfare about a sparkler as such, and particularly about petitioner's sparklers. If used carelessly or negligently it, of course, becomes an instrument of harm, as will everything else known to man today. The Legislature cannot presume that a sparkler will be used carelessly or negligently and thus become harmful to the public welfare. It must assume that it will be used properly. If used properly, a sparkler is in no way harmful to the public welfare and thus is not subject to the police power, or at least subject to the extent of complete suppression.

By virtue of respondents' motion to dismiss in the trial court, it was admitted that petitioner's sparklers are not dangerous or harmful to the public but, on the contrary, are of beneficial and useful value.

We ask this Court to take judicial notice of the vast number of accidents, injuries, property loss and even deaths caused by such relatively "safe" items as matches, cigarettes, stoves, heaters, automobiles, bicycles and the like. No hue and cry has gone up to ban the sale of these items, which are infinitely more dangerous to the public welfare than sparklers. Indeed, if any attempt were made to completely prohibit their sale under the guise of protecting the public welfare and safety, such attempt would be immediately struck down.

Those items that are inherently dangerous are to be distinguished from those that are not. The State is deemed to have power to suppress those things that are inherently

dangerous. It does not have the power to completely suppress those that are not. (*Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402).

It is contended that the matters that respondents ask this Court to take judicial notice of are not of such public concern and notoriety which is known generally by all well-informed persons. Therefore, this Court may not take judicial notice of such matters, and consequently there is a complete failure of proof in the record to support respondents' contention that sparklers are inherently dangerous and cause many injuries and deaths to children.

As heretofore stated in the Petition for Certiorari, the sale and use of sparklers were made lawful at all times in Illinois by specific legislation since 1935. Various amendments were enacted in subsequent years and in each instance, the legality of the sale and use of sparklers was continued and reaffirmed. This is an entirely different situation from that which existed in the cases cited by respondents (*Brand* v. *Union Elevated R. R. Co.*, 238 U. S. 586, *Beer* v. *Massachusetts*, 97 U. S. 25, *Williams* v. *Lee Optical Co.*, 348 U. S. 483.) In all of these cases, the matters involved were legal prior to the legislation in question by virtue of the fact that there was no legislation of any kind regulating them. The statutes being attacked in those cases were the first to affect the particular business or profession involved. That is not true in this case. Here, in reliance upon definitive and permissive legislation reaffirmed through subsequent amendments over a period of 22 years, petitioner commenced its business and invested large sums in its improvement and expansion.

The situation here involved is the same as that in *Dobbins* v. *Los Angeles*, 195 U. S. 233. In the *Dobbins* case, the petitioner had purchased land for the purpose of erecting gasworks, relying upon an ordinance that permitted such use of such land. After the purchase and commencement of construction, the ordinance was amended so as to prohibit such use for petitioner's land. The Court held that the change in the ordinance after the petitioner had purchased the property and gone forward with the erection of the works in reliance upon the ordinance brought it within that class of cases where the court may restrain the arbitrary and discriminatory exercise of the police power, which amounts to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment to the Federal Constitution.

CONCLUSION.

For reasons suggested in this brief and the Petition for Certiorari, it is respectfully submitted that Certiorari in this case should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE PROOF

I, JAMES C. MURRAY, a member of the Bar of this Court hereby certify that on the 3rd day of October, A. D. 1958, I served five copies of the above Reply Brief on Latham Castle, Attorney General of the State of Illinois, by mailing the same to him, sufficient postage prepaid at his address of record, 160 North La Salle Street, Chicago, Illinois.

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